

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

IRMA C. ALFARO,)
Plaintiff,) No. CV-08-0113-CI
v.) ORDER GRANTING PLAINTIFF'S
MICHAEL J. ASTRUE, Commissioner) MOTION FOR SUMMARY JUDGMENT
of Social Security,) AND REMANDING FOR ADDITIONAL
Defendant.) PROCEEDINGS

BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec. 13, 15.) Attorney Jeffrey Schwab represents Irma Alfaro (Plaintiff); Special Assistant United States Attorney David Burdett represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 8.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment and remands the matter to the Commissioner for additional proceedings under 42 U.S.C. § 405(g).

JURISDICTION

On March 29, 2004, Plaintiff applied for Supplemental Security Income (SSI) benefits under Title XVI of the Social Security Act. (Tr. 74, 160.) Plaintiff alleged disability due to vertigo, migraine headaches, and back ache, with an onset date of August 1, 2003. (Tr. 112.) Benefits were denied initially and on

1 reconsideration. (Tr. 42, 46.) Plaintiff requested a hearing
2 before an administrative law judge (ALJ), which was held before ALJ
3 Mary Bennett Reed on December 11, 2006. (Tr. 392-430.) Plaintiff,
4 who was represented by counsel, and vocational expert Jill Dempsey
5 testified. The ALJ denied benefits and the Appeals Council denied
6 review. (Tr. 6-7, 15-25.) The instant matter is before this court
7 pursuant to 42 U.S.C. § 405(g).

8 **STATEMENT OF THE CASE**

9 The facts of the case are set forth in detail in the transcript
10 of proceedings and are briefly summarized here. Plaintiff was 37
11 years old at the time of the hearing and had an 8th grade education.
12 (Tr. 396.) She was married but not living with her spouse. She had
13 seven children; six children, ages 8-18, were living with her at her
14 house and helped her with the household chores. (Tr. 408.) She had
15 past work experience as a combine driver, cashier and tree trimmer.
16 (Tr. 135.) Plaintiff is 5'6" tall and weighed between 236 and 265
17 pounds during the relevant period. (Tr. 17, 419.) She stated she
18 could not work due to dizziness, headaches, back aches, and nausea,
19 vomiting, and weakness from her medications. (Tr. 404-06.) She
20 stated she spent most of the day in bed due to her impairments.
21 (Tr. 409.)

22 **ADMINISTRATIVE DECISION**

23 At step one, ALJ Reed found Plaintiff had not engaged in work
24 during the relevant period. (Tr. 17.) At step two, she found
25 Plaintiff had severe impairments of "obesity, hearing loss in the
26 left ear, vertigo, borderline intellectual functioning, and
27 personality disorder." (*Id.*) At step three, the ALJ found these
28 impairments do not meet or equal one of the listed impairments in 20

1 C.F.R. Part 404, Subpart P, Appendix 1 (Listings). (Tr. 20.) ALJ
 2 Reed found Plaintiff to be "less than fully credible." (Tr. 23.)
 3 At step four she found Plaintiff had the residual functional
 4 capacity for light exertion as follows:

5 She can lift and carry 20 pounds occasionally and 10
 6 pounds frequently. She can stand and/or walk 6 hours in
 7 an 8-hour day with regularly scheduled breaks. She can
 8 sit 6 hours in an 8-hour day with regularly scheduled
 9 breaks. She can occasionally climb stairs and ramps, but
 10 should not climb ropes, ladders, or scaffolds. She should
 10 avoid work around unprotected heights or hazards. She is
 10 capable of understanding, remembering, and carrying out
 10 simple repetitive tasks. She should avoid working with
 10 the general public, but she can work alone or with a few
 10 other coworkers.

11 (Tr. 21.) Based on the record and vocational expert testimony, ALJ
 12 Reed found Plaintiff was able to perform other work in the national
 13 economy and was not disabled. (Tr. 25.)

14 STANDARD OF REVIEW

15 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
 16 court set out the standard of review:

17 The decision of the Commissioner may be reversed only if
 18 it is not supported by substantial evidence or if it is
 19 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,
 1097 (9th Cir. 1999). Substantial evidence is defined as
 20 being more than a mere scintilla, but less than a
 21 preponderance. *Id.* at 1098. Put another way, substantial
 22 evidence is such relevant evidence as a reasonable mind
 23 might accept as adequate to support a conclusion.
Richardson v. Perales, 402 U.S. 389, 401 (1971). If the
 24 evidence is susceptible to more than one rational
 25 interpretation, the court may not substitute its judgment
 26 for that of the Commissioner. *Tackett*, 180 F.3d at 1097;
Morgan v. Commissioner, 169 F.3d 595, 599 (9th Cir. 1999).

27 The ALJ is responsible for determining credibility,
 28 resolving conflicts in medical testimony, and resolving
 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
 Cir. 1995). The ALJ's determinations of law are reviewed
 de novo, although deference is owed to a reasonable
 construction of the applicable statutes. *McNatt v. Apfel*,
 201 F.3d 1084, 1087 (9th Cir. 2000).

SEQUENTIAL PROCESS

Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the requirements necessary to establish disability:

Under the Social Security Act, individuals who are "under a disability" are eligible to receive benefits. 42 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any medically determinable physical or mental impairment" which prevents one from engaging "in any substantial gainful activity" and is expected to result in death or last "for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). Such an impairment must result from "anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3). The Act also provides that a claimant will be eligible for benefits only if his impairments "are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus, the definition of disability consists of both medical and vocational components.

In evaluating whether a claimant suffers from a disability, an ALJ must apply a five-step sequential inquiry addressing both components of the definition, until a question is answered affirmatively or negatively in such a way that an ultimate determination can be made. 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The claimant bears the burden of proving that [s]he is disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). This requires the presentation of "complete and detailed objective medical reports of h[is] condition from licensed medical professionals." *Id.* (citing 20 C.F.R. §§ 404.1512(a)-(b), 404.1513(d)).

It is the role of the trier of fact, not this court, to resolve conflicts in evidence. *Perales*, 402 U.S. at 400. If evidence supports more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Brawner v. Secretary*

1 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
2 there is substantial evidence to support the administrative
3 findings, or if there is conflicting evidence that will support a
4 finding of either disability or non-disability, the finding of the
5 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
6 1230 (9th Cir. 1987).

7 **ISSUES**

8 The question is whether the ALJ's decision is supported by
9 substantial evidence and free of legal error. Plaintiff argues the
10 ALJ erred when she (1) found Plaintiff's headaches and back
11 condition were not "severe" impairments, (2) did not consider all
12 impairments in combination, and (3) found Plaintiff could perform
13 sustained work at step five. (Ct. Rec. 14.)

14 **DISCUSSION**

15 To satisfy step two's requirement of a severe impairment, the
16 claimant must prove the existence of a physical or mental impairment
17 by providing medical evidence consisting of signs, symptoms, and
18 laboratory findings; the claimant's own statement of symptoms alone
19 will not suffice. 20 C.F.R. § 416.908. The step two inquiry is a
20 *de minimis* screening device to dispose of groundless or frivolous
21 claims. *Bowen v. Yuckert*, 482 U.S. 137, 153-154 (1987). The
22 Commissioner has passed regulations which guide dismissal of claims
23 at step two. Those regulations state an impairment may be found to
24 be "not severe" only when evidence establishes a "slight
25 abnormality" on an individual's ability to work. *Yuckert v. Bowen*,
26 841 F.2d 303, 306 (9th Cir. 1988) (citing Social Security Ruling
27 (SSR) 85-28). The ALJ must consider the combined effect of all of
28 the claimant's impairments on the ability to function, without

1 regard to whether each alone was sufficiently severe. See 42 U.S.C.
2 § 423(d)(2)(B) (Supp. III 1991). The effects of all symptoms must
3 be evaluated on the basis of a medically determinable impairment
4 which can be shown to be the cause of the symptoms. 20 C.F.R. §
5 416.929. The combined effect of all medically determinable physical
6 and mental impairments should be considered at step three and four.
7 20 C.F.R. §§ 416.926(a) (c); 416.945(a)(2). The failure to do so
8 is legal error requiring remand. *Lester v. Chater*, 81 F.3d 821, 830
9 (9th Cir. 1995).

10 In determining whether a claimant has a severe impairment the
11 ALJ must evaluate the medical evidence submitted and explain the
12 weight given to the opinions of accepted medical sources in the
13 record. The regulations distinguish among the opinions of three
14 types of accepted medical sources: (1) sources who have treated the
15 claimant; (2) sources who have examined the claimant; and (3)
16 sources who have neither examined nor treated the claimant, but
17 express their opinion based upon a review of the claimant's medical
18 records. 20 C.F.R. § 416.927. A treating physician's opinion
19 carries more weight than an examining physician's, and an examining
20 physician's opinion carries more weight than a non-examining
21 reviewing or consulting physician's opinion. *Benecke v. Barnhart*,
22 379 F.3d 587, 592 (9th Cir. 2004); *Lester*, 81 F.3d at 830. "As is
23 the case with the opinion of a treating physician, the Commissioner
24 must provide 'clear and convincing' reasons for rejecting the
25 uncontradicted opinion of an examining physician." *Lester*, 81 F.3d
26 at 830 (citation omitted). If the opinion is contradicted, it can
27 only be rejected for specific and legitimate reasons that are
28 supported by substantial evidence in the record. *Andrews*, 53 F.3d

1 at 1043.

2 Here, the ALJ discussed the medical evidence which included
3 reports from treating physicians Tuan Nguyen, M.D., and Lylanya Cox,
4 M.D., at Moses Lake Community Health, examining neurologist Craig
5 Garver, M.D., and examining psychologist James Bailey, Ph.D. She
6 also considered evidence from non-examining agency physicians,
7 Sharon Underwood, Ph.D., and Sean Mee, Ph.D. (Tr. 17-20, 21-22, 23-
8 24.) The ALJ found Plaintiff's chronic low back pain and chronic
9 headaches were not severe impairments because they "have not been
10 shown to have posed more than minimal limitation on her ability to
11 perform basic work-related activities." (Tr. 20.)

12 Medical records indicate Plaintiff was treated for headache and
13 low back pain at the Moses Lake Community Health clinic (MLCH) on
14 March 20, 2003, her first medical appointment since September 2002,
15 when she was seen for a rash and pain of the right arm. (Tr. 280-
16 83.) Imaging reports from March 2002, indicated "negative
17 lumbosacral spine," no fractures, and well-maintained disc spaces
18 and vertebral body heights. (Tr. 283.) Dr. Nguyen prescribed
19 medication and referred Plaintiff to Craig Garver, M.D.,
20 neurologist, for evaluation of chronic dizziness and headaches.¹ In
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22 ¹ Plaintiff had seen Dr. Garver in 1999 and 2000 for vertigo
23 and headaches. (Tr. 239.) At that time, after treatment and
24 followup, her back pain, vertigo and headaches were considered
25 "mild," (i.e., causing "no significant interference" with work
26 activities) by her primary treatment provider in August 2001. (Tr.
27 248.) She was found to have full range of motion and no limitations
28 on agility or flexibility. Physical therapy and weight loss were

1 his June 2003 evaluation, Dr. Garver noted Plaintiff had suffered a
2 head injury before she was seven years old. (Tr. 285.) Plaintiff
3 reported her head had been hit by a car trunk lid when she was six
4 years old, and she was hospitalized for several days. (Tr. 290.)
5 She stated she had had a prior CT scan in Moses Lake, but this
6 medical report is not in the record before the court. Dr. Garver
7 concluded since she was having "no focal symptoms," a repeat scan
8 was not needed. (Tr. 288.) Dr. Garver prescribed a new medication
9 regime, and referred her to therapy to learn techniques she found
10 effective in relieving her dizziness in the past. (Tr. 287-88.)
11 Plaintiff reported dizziness was preventing her from finding labor
12 work that required bending, and Dr. Garver opined her vertigo would
13 impair her ability to work at heights or at jobs requiring bending.
14 (Tr. 287-88.) He encouraged Plaintiff to look for jobs that did not
15 require these activities. (Tr. 288.) The ALJ correctly found
16 Plaintiff's vertigo is a "severe impairment," based on Dr. Garver's
17 evaluation and treatment.

18 In contrast, there is no objective medical evidence that
19 Plaintiff had a medically determinable back impairment. Plaintiff's
20 statements of chronic back pain are not sufficient to establish a
21 severe impairment. As discussed in the ALJ's credibility findings,
22 Plaintiff's employers reported she worked driving a combine without
23 any indication of impairment. (Tr. 23, 229-30, 233-34.) In August
24 2001, Plaintiff's medical providers noted her back problems were due
25 to obesity and deconditioning. (Tr. 247.) In 2000, imaging reports
26 did not show abnormalities. (Tr. 283.) Because there is no
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28 recommended. (Tr. 249.)

1 objective medical evidence of a back impairment, the ALJ properly
2 found no severe back impairment. 20 C.F.R. § 416.908.

3 As for migraine headaches, the ALJ discounted Plaintiff's
4 complaints of headache pain, speculating that Plaintiff may be
5 motivated by drug-seeking behavior. (Tr. 20, 23.) This reason is
6 not supported by substantial evidence. The record includes
7 consistent diagnoses of "migraine headache" and "chronic headache"
8 from Plaintiff's treating physicians, who treated her with a variety
9 of medications. These diagnoses were not rejected with "clear and
10 convincing evidence." See *Lester*, 81 F.3d at 830-32. Plaintiff's
11 complaints of headache pain, and difficulties with migraine
12 treatment are fully documented in the record. Her complaints are
13 entirely consistent with a diagnoses of migraine headaches;
14 therefore, this impairment is considered "severe" at step two. *Webb*
15 v. *Barnhart*, 433 F.3d 683, 687-88 (9th Cir. 2005).

16 Because chronic migraine headaches were diagnosed by
17 Plaintiff's treating physicians, and were treated with pain
18 medication, it follows that this impairment could be reasonably
19 expected to cause pain. However, it is noted on independent review
20 that the ALJ did not include the effects of pain, in combination
21 with Plaintiff's vertigo, obesity, and effects of the medications in
22 her hypothetical to the vocational expert at step five. This is
23 legal error. *Embrey v. Bowen*, 849 F.2d 418, 423 (9th Cir. 1988).
24 Further, the VE testimony is not conclusive that Plaintiff could
25 perform or sustain work with her limitations.

26 At step five, the ALJ presented the following hypothetical:

27 [T]his person is limited to lifting and carrying 20 pounds
28 occasionally, 10 pounds frequently. Able to stand and

1 walk for six hours out of eight, and sit for six hours out
2 of eight with normal breaks. Can occasionally climb
3 stairs and ramps and balance. To avoid climbing ropes,
4 ladders, or scaffolds, or working around unprotected
5 heights or hazards. That this person be limited to
understanding, remembering and carrying out simple,
repetitive tasks. And she should avoid working in
occupations where she would have to work with the general
public, but would be able to work alone or with a few
other coworkers.

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7 (Tr. 423-24.) The VE testified there would be a significant number
8 of light, unskilled work Plaintiff could do. (Tr. 424.)

9 In a second hypothetical, the ALJ added the following
10 limitations: "[T]his person could have periods of vertigo lasting
11 for a couple of minutes. It would be triggered by moving their head
12 from side to side, or up and down, or even bending over and coming
13 back up. You know, bending at the waist." (Tr. 425.) After the
14 second hypothetical, the VE testified that in all jobs identified,
15 "there would be movement of the head." (*Id.*) When asked by the ALJ
16 if the jobs identified were precluded by the additional limitations,
17 the VE did not respond directly. (*Id.*) It is not clear, based on
18 this testimony, the VE's testimony in response to follow-up
19 examination by Plaintiff's representative, and the ALJ's finding
20 that Plaintiff had severe vertigo, that Plaintiff can perform the
21 jobs identified, considering all symptoms in combination, including
22 psychological symptoms. (See Tr. 426.)

23 The ALJ's failure to consider the effects of all Plaintiff's
24 impairments and symptoms in combination at steps four and five is
25 legal error. Because the hypothetical does not include all
26 limitations supported by the record, including pain due to chronic
27 headaches, the vocational expert's testimony is not substantial
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1 evidence. *Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9th Cir. 2005).
2 It is not clear from the record that Plaintiff is disabled;
3 therefore, remand for additional proceedings is required. *Benecke*,
4 379 F.3d at 593.

5 Because a step two determination that an impairment is severe
6 "only raises a *prima facie* case of a disability," Plaintiff might
7 not succeed in proving she is disabled, as defined by the Social
8 Security Act. *Hoopai v. Astrue*, 499 F.3d 1071, 1076 (9th Cir. 2007)
9 (citing *Tackett*, 180 F.3d at 1100). However, it is not conclusive
10 that a reasonable ALJ, considering Plaintiff's limitations caused by
11 physical and psychological impairments in combination (as required
12 by the Regulations) would find Plaintiff "not disabled." *Stout v.*
13 *Commissioner*, 454 F.3d 1050, 1056 (9th Cir. 2006). On remand,
14 Plaintiff may submit additional medical evidence, including results
15 of new imaging and the CAT scan which, according to Plaintiff, was
16 being ordered by her treating physician to evaluate further
17 Plaintiff's condition. (Tr. 408.) The ALJ will obtain a new
18 neurological consultative examination and medical expert testimony,
19 if deemed necessary to fully evaluate Plaintiff's impairments.
20 Accordingly,

21 **IT IS ORDERED:**

22 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is
23 **GRANTED** and the case shall be remanded to the Commissioner pursuant
24 to 42 U.S.C. § 405(g) for additional proceedings as directed above;

25 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 15**) is
26 **DENIED**;

27 3. Application for attorney fees may be made by separate
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1 motion.

2 The District Court Executive is directed to file this Order and
3 provide a copy to counsel for Plaintiff and Defendant. Judgment
4 shall be entered for **PLAINTIFF**, and the file shall be **CLOSED**.

5 DATED February 13, 2009.

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7 S/ CYNTHIA IMBROGNO
8 UNITED STATES MAGISTRATE JUDGE
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